

up of moneys actually before then advanced to the said Joshua and William Hitch by this respondent, and of debts they owed positively assumed by this respondent, and subsequently paid by him.

It clearly appears, then, if this answer is true, that the decree was not taken simply to secure an unascertained balance, but for a specific sum then actually due, and for other sums assumed by Fenby for the two Hitches as their surety, which other sums he has since paid.

The question is, not whether the decree of 1841 was obtained by fraud, for it is not pretended that it was so obtained, but whether it is now about to be used for a fraudulent and oppressive purpose, and in the consideration of this question, it is immaterial whether any portion of the amount for which the decree was taken was for money then actually advanced or subsequently advanced. For it is clear there would be no fraud or oppression in using the decree to compel the repayment of money for which Fenby was liable as surety, which the decree designed to secure, and which he has since in fact paid.

But the issue in fact made by the bill and answer in the case is, whether the decree of 1841 was given for an arbitrary sum, being intended merely to secure the balance which, upon an adjustment of accounts, should be found due Fenby, or for an ascertained balance then due and to become due as the assumed liabilities should be paid by him. If the parties agreed that the liabilities assumed by Fenby for the Messrs. Hitch should be added to the amount due him for advances then actually made and included in the decree, there could be no objection to it, nor any unfairness in using the decree to compel repayment if those liabilities have since in fact been paid by Fenby.

The bill in this case alleges that the decree was not given for any such ascertained amount, but as a security for such balance as might upon settlement be found due Fenby. This averment of the bill is met by a denial in the answer, and as I read the evidence, there is not sufficient proof to countervail this denial. Indeed, looking to the answer of the two Hitches in 1841, in which upon their oaths they distinctly admit the very sum for